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IN THE

# Supreme Court of the United States

October Term, 1959

No. 751.

SARAH HUNTER KELLY,

*Petitioner,*

v.

THE UNITED STATES.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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# INDEX


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 15 |
| Expressed Congressional Intent | 23 |
| Conclusion | 27 |
| Appendix I | 28 |
| Appendix II | 33 |
| Appendix III | 35 |
| Appendix IV | 36 |
| Appendix V | 37 |
| Appendix VI | 38 |
| Appendix VII | 40 |


## CASES CITED


| | |
|---|---|
| Barger v. Durwin, 22 Barb. (N. Y.) 68 | 8 |
| Clute v. Clute, 90 N. E. 988, 197 N. Y. 439, affirmed 132 A. D. 938 | 8 |
| Dayton Airplane Co. v. U. S., 21 F. (2d) 673 | 23 |
| Doe v. Braden, 16 How. 635 (1853) | 21 |
| Dow v. Johnson (1880), 100 U. S. 158, 25 L. ed. 632 | 19 |
| Duncan v. Kahanamoku (1944, D. C. Hawaii), 66 F. Supp. 976 | 19 |

PAGE

First National Bank v. Leech, 94 Fed. 311 (C. C. A. 8 Cir. 1899) and cases ..... 8

First National Bank v. U. S., 2 F. Supp. 107 ..... 23

Geofroy v. Riggs, 133 U. S. 258 (1890) ..... 21, 22

Hard v. Burton, 62 Vermont 314 ..... 8

In re Rochester Trust & Safe Deposit Co., 270 A. D. (N. Y. 227) ..... 8

Johnson v. Eisentrager, 339 U. S. 763 (1950) ..... 17

Kinsella v. U. S. ..... 15

Lechleiter v. Lechleiter, 330 Ill. App. 517 ..... 8

Martin v. Williams, 17 Johns. (N. Y.) 330 ..... 8

Mitchell v. Harmony, 13 How. 134 ..... 17

Payne v. Slate & Gardner, 39 Barb. 634, affd. 28 N. Y. 146 8

Phelps v. U. S. (1927), 274 U. S. 341 ..... 18

Poucher v. Board of Education of City of N. Y., 128 Misc. Rep. (N. Y.) 853 ..... 8

Reid v. Covert, 354 U. S. 1 ..... 15, 17, 18, 20, 22

Ritter v. U. S., 3 Circuit, 28 Fed. 2nd 265 ..... 23

Romano v. Metropolitan Life Ins. Co., 271 N. Y. 288 ..... 23

Schenley Import v. U. S., 129 Ct. Cls. 327, 121 F. Supp. 646 ..... 23

Seery v. United States, 130 C. Cls. 481 ..... 9, 22, 27

State of Iowa v. Carr, 191 Fed. 257 ..... 23

The Cherokee Tobacco, 11 Wall. 616 (1870) ..... 21

Triple Cities Constr. Co. v. Maryland Casualty Co. (decided June 25, 1958) 4 New York Reports, 2d Series 443 .... 23

Turney v. U. S., 126 C. Cls. 202 ..... 22, 27

BLEED THROUGH POOR COPY

PAGE

Union National Bank of Franklinville v. Dean, 154 App. Div. (N. Y.) 869 ..... 8

U. S. v. Atlantic Dredging Co., 253 U. S. 1 ..... 23

U. S. v. Chandler-Dunbar Water Power Co., 152 Fed. 25 .. 23

U. S. v. Denver & R. G. W. R. Co., 167 F. 2nd 374 ..... 23

U. S. v. Leppert, 100 U. S. 663 ..... 23

U. S. v. Russell (1870), 13 Wall. (80 U. S.) 623, 20 L. ed. 474 ..... 17

U. S. v. Taylor, 104 U. S. 216 ..... 23

U. S. Shipping v. Harwood, 281 U. S. 519 ..... 8

Walker v. U. S., 139 Fed. Rep. 409 ..... 23

Wiggins v. U. S., 3 C. Cls. 412 ..... 17

## STATUTES CITED

28 U. S. C. 1255 ..... 1

Fifth Amendment to the Constitution .....4, 8, 16

Lend-Lease Act of 1941 ..... 4, 18

Third Amendment, Bill of Rights ..... 16

WAR, 56 Am. Jur. Sec. 33 ..... 16

Fourteenth Amendment ..... 16

16 Stat. 319, 10 U. S. C. 16, Sec. 20 ..... 19

Requisitioning Act of 1941 (Conf. Report of June 30, 1951) 23

Foreign Claims Act, Amended 1954, 1956 .....23, 24, 25

62 Stat. 3826 ..... 26

63 Stat. 2499, 2507 ..... 26

## AUTHORITIES CITED

PAGE

Press Release #37, January 15, 1947 ..... 5

Reciprocal Aid Claims Agreement .....5, 6, 14, 25

Byrnes-Blum Agreement .....5, 6, 14, 27

Restatement of Contracts, Vol. 1, §141; Vol. 2, §428, Comment A; Vol. 2, §417 ..... 8

Williston on Contracts (1938) Section 1875, p. 5262, footnote 1 ..... 8

Williston on Contracts (1938) Section 1870 ..... 8

Eisenhower-Hoenig Agreement .....12, 14, 18, 25

Mutual Aid Settlement Agreement ..... 25, 26

United States Army and Navy Manuel of Military Government and Civil Affairs, December 22, 1943 (FM27-5). Repeated in FM27-5 of October 1947 ..... 25

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

SARAH HUNTER KELLY,

*Petitioner,*

v.

THE UNITED STATES.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner prays that a writ of certiorari issue to review the judgment entered in this case on July 13, 1959, by the United States Court of Claims.

### Opinion Below

The opinion of the Court of Claims herein, entered on July 13, 1959, is appended hereto (A. 28-33).*

### Jurisdiction

The judgment of the Court of Claims was entered on July 13, 1959, and motion for rehearing, timely made, was overruled on December 2, 1959 (R. 85). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

* "A" references are to pages of the Appendix herein.

## Questions Presented

1) Does the Constitution follow the flag, viz.: whether a loyal American citizen, domiciled and residing in the United States, whose chateau outside Paris was occupied without her consent and damaged by U. S. military forces during World War II, is entitled to fair compensation under the Constitution for the damage wrought?

2) Whether Congress intended, under the Lend-Lease Act, to authorize our Army to request that France take and furnish, as reverse lend-lease, the private residence abroad of a loyal American citizen-resident, for the use and occupation of the U. S. Forces without responsibility of our Government, under the Constitution, to the American owner for fair compensation for damages resulting therefrom?

3) Whether an American Army Standard Operating Procedure directive (SOP No. 10F) is null and void to the extent that it ordered that American private property be taken by France upon our Army's demand and furnished, as reverse lend-lease, to our Army without United States obligation for payment of fair compensation for damage incurred, in violation of the Constitution and the Army's oath to enforce our laws?

4) Whether an executive agreement, or treaty, is null and void to the extent that it impairs the rights of a loyal American resident-citizen under the Constitution for just compensation for damage to her private property in a friendly country occupied and used by the American Forces? Whether a conflict in decisions on this point should be resolved?

5) Whether the Government, after expiration of the Statute of Limitations, may repudiate with impunity repre-

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sentations and directions made in writing and orally by duly constituted authorities to an American citizen, upon which she relied and acted in good faith, to her detriment and irreparable damage?

6) Whether the principle of agency (or creditor beneficiary) was express or implied under the Constitution in the Byrnes-Blum Agreement and the Statute tolled?

## Statement of the Case

1. Mrs. Sarah Hunter Kelly, the petitioner herein, is a loyal, native-born American citizen, who has resided continuously in the United States since 1934. She became the owner in 1927 of the "Chateau de Mereville," located in Mereville, Seine-et-Oise, France. Said property was used and occupied, as a replacement center, by our Army during World War II, from October 17, 1944 until August 28, 1945. Two thousand officers and men were quartered on the premises for weekly periods—a total of approximately 80,000.

2. This 100 room chateau was built as a Roman fort about the year 525. In 1775, after purchase by the Marquis de Laborde, it was rebuilt in the manner of Versailles at an estimated cost in those days of $3,000,000. During the period 1927 to 1933, it was completely modernized by Mrs. Kelly, with all the conveniences of central heating, modern plumbing and refrigeration, electricity, two up-to-date kitchens, a laundry, 12 baths, etc. The castle and landscaped grounds were restored to their former glory and beauty.

3. The approximately 80,000 American servicemen who occupied the property understandably wrought great damage: ceilings collapsed from excessive use of the upper

floors as dormitories; plumbing and facilities were overtaxed and finally failed to function; initials were carved in the rare 18th century wood paneling; parquet flooring was scuffed beyond repair; windows were broken and left unrepaired, the elements causing erosion of the walls; one of the four towers of the castle was destroyed by fire; the vast marble fire-places were blown out from use of kerosene when lighting fires therein; the magnificent 150-year old chestnut trees forming a grand alley approach to the castle were chopped down for firewood. There were other damages too numerous to list to the chateau and other buildings on Mrs. Kelly's premises (Pet.'s Exh. B).

4. Mrs. Kelly's claim for just compensation for said damages under an implied contract under the Fifth Amendment to the Constitution was duly and properly filed with "Headquarters, U. S. Forces, European Theater, Claims Liaison Section, APO 887," in January 1946 (Pltf.'s Exh. #1).

5. The petitioner was thereafter advised orally by proper governmental authorities that in the Lend-Lease Act of 1941 Congress had included a provision for repayment of the lend-lease it had given France and other countries, payable "in kind or property, or in other direct or indirect benefit," known as reverse lend-lease; that under agreements entered into with France, she must look first to France for payment of her damage claim, as reverse lend-lease, and then, if unsatisfied, could look to the United States.

6. On February 19, 1946, Mrs. Kelly was informed in writing by Deputy Chief of Claims, Headquarters, U. S. Forces, European Theater, Claims Liaison Section, that her claim for damages had been received and investigated,

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that it was one falling within the terms of the Reciprocal Aid Claims Agreement, and was therefore being referred to the Directeur de l'Intendance de la Region de Paris for processing (Pltf.'s Exh. #1). The claim was not rejected and returned to petitioner, but was, instead, "referred to" the French Processing Agency. The pertinent excerpt from said agreement is annexed hereto as A. 33-35.

7. On January 15, 1947, the Department of State issued Press Release #37, advising that American nationals who suffered damage to property in France on account of the war were accorded benefits under Article 7 of the Agreement of May 28, 1946, between the United States and France, viz.: Mutual Aid Settlement Agreement (hereinafter referred to as the "Byrnes-Blum Agreement") (Pltf.'s Exh. #14-A). Said article subsequently appeared in the Herald Tribune of Paris (Pltf.'s Exh. #15). Said Article 7 is attached hereto as A. 35.

8. On August 25, 1948, the Office of the U. S. Claims Examiner advised Mrs. Kelly that "according to existing agreements between the U. S. Government and France, claims of this nature must be processed and settled by the competent French authorities." Attached to said letter was a copy of a report of an investigation made in August 1948 (three years after derequisition) by the U. S. Claims Examiner, Headquarters, American Graves Registration Command, European Theater, Office of the Staff Judge Advocate. Said report stated that "The property of Mrs. Kelly *was requisitioned by the U. S. Army* from 17 October 1944 until 22 August 1945." The fact of requisition by the U. S. Army was repeated several times in said report (Pltf.'s Exh. #13).

9. On September 29, 1954, the Acting Secretary of State represented in writing that Mrs. Kelly's claim was one fall-

ing under paragraph 6(c) and Article VII of the Byrnes-Blum Agreement of May 28, 1946, and must be processed by the French (Pltf.'s Exh. #2). In said Mutual Aid Settlement Agreement (Byrnes-Blum) an attempt was made by the United States to total up the vast sums given as lend-lease to France, and France totaled up the sums represented by reverse lend-lease and a balance was struck. As part of said agreement, France promised to assume certain obligations, and the United States agreed to assume others. The text of said paragraph 6(c) is set forth in A. 36.

10. The Reciprocal Aid Claims Agreement, paragraph D (A. 33-35) formed the basis for paragraph 6(c) of the Byrnes-Blum Agreement (A. 36) (Tr. Cooley, p. 56). Hereafter, reference to the Byrnes-Blum Agreement will include reference to said paragraph of the Reciprocal Aid Claims Agreement.

11. On October 21, 1954, the Department of State repeated in writing the representation of the Acting Secretary of State set forth in par. "9" above (Pltf.'s Exh. #3).*

12. Numerous oral representations to similar effect were made to Mrs. Kelly in conference with the U. S. Claims

* Said letter read:

> "* * * Under Article 6(c) of the accord the French Government agreed to process the claims arising out of acts committed prior to July 1, 1946 in France by members of the Armed Forces of the United States. Article 7 of the agreement provides that 'The French Government will accord to American nationals who have suffered damage to their properties in France through causes originating in the war compensation equal to that payable to French nationals having the same types and extent of losses.' The United States Government has informed the French Government that equality of treatment is accorded to the French and American nationals with reference to war damage to property in the United States."

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Commission in Paris, the State Department in Washington, and other governmental authorities, during the entire period from January 1946. At all times she was directed that she was to look first to France for payment under reverse lend-lease and then, if unsatisfied, under the Constitution, she could look to the United States for payment. Mrs. Kelly has not yet had an opportunity to testify and present this evidence.

13. French Finance Minister Petsche provided Mrs. Kelly with a letter he received on March 17, 1949 from the French Defense Minister concerning her claim and stating that it had been referred to them "by virtue of the Washington agreements" (Pltf.'s Exh. #26). The "Washington" agreements were, of course, those above referred to, no other agreements here involved having been made in Washington.

14. In good faith and in reliance upon the above and other similar representations and directions of proper United States Authorities, imposed upon her, and although she protested the referral, Mrs. Kelly negotiated with the French Processing Agency. Many trips had to be made between this country and France, and she was subjected to demands for a bribe on the part of a French official and acts of attrition when she refused, and other acts which would not be countenanced in this country (R. 9-11).

15. On January 16, 1951, Mrs. Kelly entered into an executory accord with the French Processing Agency, under which France agreed to pay the sum of $320,000, viz.: 16,000,000 French Francs at the revalorization law of April 1949 of 50 francs for one dollar (Pltf.'s Exhs. #27A, B). Payments were made thereunder totaling $51,405 in *unconvertible* French Francs. Without contributory cause by petitioner, the French breached said executory accord and payment was not completed.

16. Thereupon, Mrs. Kelly instituted suit against the United States on December 28, 1955, for the unpaid balance of $268,594.87, with interest, still due under the executory accord, on the theory that, having filed her claim with the duly constituted American authorities and her claim not having been returned but having been referred by them to the French Processing Agency for processing and settlement over her protest, the acknowledgment of the debt (i.e. the executory accord) by the French, who acted as the duly appointed third party representative or agent of the United States, and the part payments made thereunder by the French, imputed to the United States as principal, tolled the statute of limitations.*

17. In her second cause of action, Mrs. Kelly urged the theory of creditor beneficiary on the ground that the United States could not by its referral extinguish plaintiff's right which had grown out of and was dependent upon an implied contract under the Fifth Amendment of the Constitution and which right persisted, and that under the simplest debtor-creditor relationship acknowledgment and part payment tolled the statute.**

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* Law of Agency and tolling of Statute: *Martin* v. *Williams*, 17 Johns. (N. Y.) 330; *Poucher* v. *Board of Education of City of N. Y.*, 128 Misc. Rep. (N. Y.) 853; *In re Rochester Trust & Safe Deposit Co.*, 270 A. D. (N. Y. 227); *Clute* v. *Clute*, 90 N. E. 988, 197 N. Y. 439, affirmed 132 A. D. 938; *Payne* v. *Slate & Gardner*, 39 Barb. 634, affd. 28 N. Y. 146; *Union National Bank of Franklinville* v. *Dean*, 154 App. Div. (N. Y.) 869; *Barger* v. *Durvin*, 22 Barb. (N. Y.) 68.

** Law as to Creditor Beneficiary: *Restatement of Contracts*, Vol. 1, §141; Vol. 2, §428, Comment A; Vol. 2, §417; *First National Bank* v. *Leech*, 94 Fed. 311 (C. C. A. 8 Cir. 1899) and cases; *Hard* v. *Burton*, 62 Vermont 314; 6 *Williston on Contracts* (1938) Section 1875, p. 5262, footnote 1; *Williston, supra*, Section 1870, *Lechleiter* v. *Lechleiter*, 330 Ill. App. 517; *U. S. Shipping* v. *Harwood*, 281 U. S. 519, 527.

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18. Mrs. Kelly's position stated in pars. "16" and "17" above remains unchanged, and all arguments put forward by her hereinafter are intended to support said position.

19. The Government argued in its motion to dismiss that "the Byrnes-Blum Agreement could not (and by its terms, did not) require plaintiff to seek a determination by the French Government as a prerequisite to a suit for just compensation in this Court" and that "so far as it might have purported to make France primarily responsible for claims of this type, would appear to be a nullity," citing *Seery* v. *United States,* 130 C. Cls. 481. The Government pleaded bar by the statute of limitations.

20. As to the second cause of action, the Government argued that it grew out of or was dependent upon the Byrnes-Blum Agreement, which was a treaty, or in the alternative, was barred by the statute of limitations.

21. The Court of Claims directed that the parties stipulate facts or submit evidence showing under what statute, executive order or other authority the American officials acted in making the agreement that France would process claims of American nationals who had suffered damage in France from causes originating in the war and compensate them, what letters or memoranda were exchanged between the two governments while negotiating such agreement which would bear on the question of agency, and to what extent it was intended by them that the United States should be bound by any action that might be taken by the French government in processing such claim.

22. Inasmuch as Mrs. Kelly was unsuccessful in attempts to obtain the required information from the Government, she filed a motion for call upon the Department of State. A conference of the parties was held with Commissioner W.

Ney Evans on November 1, 1957, and a trial session was had on December 12-13, 1957, in the course of which the purpose of the session was broadened to include the taking of evidence as to the theory of agency.

23. At said hearing, Professor Michael M. Cardozo of Cornell Law School, one of the prime negotiators of the Byrnes-Blum Agreement and other similar agreements, for the United States, entered into at that time, appeared for Mrs. Kelly and testified as follows:

> "A. Now the idea of the negotiators of the Byrnes-Blum Agreement was simply that when someone came to the U. S. with a claim which was covered by the agreement, the United States would say to the French 'Here's one of the claims you have agreed to process and pay; will you please negotiate with the claimant, reach an understanding as to the amount as far as you can, and pay it,' and that will discharge the United States obligation. The negotiators did not intend to write into this agreement a discharge of the U. S. obligation to pay just compensation, for instance, for requisitioned property * * *. There was always lurking the possibility that by an executive agreement an attempt to discharge the liability that way might not be considered constitutional * * *. (Tr. Cardozo, pp. [illegible].)
>
> A. The intent of the negotiators was to refer the claimants to France, but there was no thought that this would mean that they could not look to the United States for compensation if they could not get adequate settlement from the French (Tr. Cardozo, p. 149).
>
> Q. Well, did you wish to have them first exhaust the administrative remedies with France? A. Well,

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it is a little different from the usual use of that expression, but it was true that that was the effect of it. They were supposed to do what they could to get settlement from the French before they came back to the United States offices (Tr. Cardozo, p. 166).

Commissioner: Do I correctly understand it to be your testimony that it was the concept of the negotiators of the Byrnes-Blum Agreement, that in arranging for France to take over the processing of some of these claims the United States was merely providing for an administrative procedure, the kind we customarily require a claimant of the United States to go through, and that that is the substance of what was done in this situation, that you set up an administrative procedure, told the claimant, 'Go through an administrative procedure with France and if you don't get satisfaction come to the U. S. and we will listen to you'? A. I think that that is very close to it. I think there might be some differences from what we ordinarily think of as encompassing an administrative procedure because we were at all times sending them to another country, another government, which was a little different than sending them to a certain court or bureau.

Q. Well, now, there was no statute enacted in support of that, was there? A. This procedure in 6(c) was an executive agreement between the two governments; there was no statutory authority—except that the Lend-Lease Act authorized the President to settle lend-lease under such a condition" (Tr. Cardozo, pp. 187-8).

24. At said hearing, the Government changed its position, repudiating the aforementioned written and oral rep-

resentations made to plaintiff, and contended that Mrs. Kelly's claim came under a letter agreement of August 25, 1944, entered into between General Dwight D. Eisenhower, United States Army, Commanding General, U. S. Army Forces, European Theater of Operations, and General of the Army Koenig, Chief of the French Military Mission, the pertinent part of which is attached hereto as A. 37-38.

25. This agreement "arranged" for the furnishing by France, as reverse lend-lease of supplies, services and facilities needed by the U. S. Forces. It eliminated language difficulties, and permitted French officials to deal with Frenchmen under French law, releasing our men from this onerous task which could have otherwise frequently resulted in damaged public relations. Furthermore, a tendency had developed on the part of the French owners to exaggerate prices when the U. S. Army or other competing Army (British, Canadian or French) did the purchasing, which the French officials could cope with by being responsible for *all* the purchasing. And of even greater importance, it enabled us to get some return in the way of reverse lend-lease of the vast sums we had advanced.

26. It was the Government's position that under the Eisenhower-Koenig agreement, France had "taken" the plaintiff's property and furnished it to the U. S. Forces as reverse lend-lease, without any obligation on the part of the United States to the American owner under the Constitution.

27. In support thereof, the Government produced certain "Restricted Files," which had never been available to Mrs. Kelly but were at all times in the exclusive possession and control of the Government. These included

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directives to the U. S. Army, entitled "Standard Operating Procedure," covering U. S. Army regulations for the procurement or requisition from the inhabitants of supplies, services and facilities in occupied and liberated territories during the period April 1, 1944 through September 23, 1944 (Def. Exh. #1, 2, 10), and certain instructions issued by the French General Bookkeeping Department correlating the procurement or requisition regulations of the U. S., British, Canadian and French Armies, setting forth a standard form of requisition, called a "Demand (Mutual Aid)", and a "Receipt (Mutual Aid)," to be used by all said armies, particularly for accounting purposes (Def. Exh. #4, 5).

28. The mechanics of the procurement were simple: when the U. S. Army (or the British, Canadian or French Armies) needed a house, a bag of potatoes, or a railroad siding, etc., the prescribed "demand" in writing (Pltf.'s Exh. #11) was given by a U. S. officer to a French liaison officer or a French mayor, if no liaison official could be found; our Army was furnished with the item required and the U. S. Army Officer gave a receipt therefor. French officials thereupon negotiated with and made payment directly to the French owner of the item, and the French Government recorded a credit for itself against its lend-lease debt to the United States for the sum so paid. Britain and Canada had similar accounting arrangements with the French (Def. Exh. #4, 5). Reciprocal aid reports were made quarterly (Def. Ex. #18, pp. 69-72).

29. Under this arrangement, the French agreed, as reverse lend-lease, to be responsible for procurement and rental of real property, and *normal* damage resulting from military occupation (Def. Exh. #4, p. 12).

30. Further among the "Restricted Files" produced by the Government were a series of cables (Def. Exh. #13)

between General Eisenhower and the Under-Secretary of State in December 1944, in which the U. S. obligation was recognized for claims, among others, "where the damage or destruction is the result of the use or occupancy of such property for the purpose for which the same was requisitioned or otherwise used or occupied," and agreeing that said claims would also be paid by the French as reverse lend-lease. Out of this exchange of cables grew the references to said "civil claims" in the Reciprocal Aid Claims Agreement and Byrnes-Blum Agreement, par. 6(c) —A. 33-5; A. 36.

31. On October 17, 1944, after the liberation of Paris, the U. S. Army found Mrs. Kelly's chateau desirable—particularly the 100 rooms, modern plumbing, etc., and moved in. It was not until four months after occupation, viz.: on February 27, 1945, that an American officer made a demand on the French mayor (Pltf.'s Exh. #11). No demand other than that produced by Mrs. Kelly (February 27, 1945) was offered. That a demand was made and receipt given upon the occupation of the property is mere conjecture, or at best hearsay, contradicted by the documentary proof (Pltf.'s Exh. #11).

32. The Commissioner found:

> "There is no evidence of any authority under which United States Forces have acted in occupying the premises other than SOP No. 10F [Def. Exh. #10] and the agreements between the United States and the Republic of France upon which the SOP was based."

The agreements referred to were the Eisenhower-Koenig agreement above referred to, and agreements between the United States and Fighting French and French Committee

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of National Liberation, respectively, setting up a *modus vivendi* for reverse lend-lease (A. VI, pp. 38-40).

33. In dismissing plaintiff's petition, the Court held:

> "Evidence was adduced before the trial commissioner on the basis of which he found and the court adopts his findings that the plaintiff's property was taken by French authorities under the laws of France."

**Reasons for Granting the Writ**

1) Transportation makes it possible these days for our citizens to own property, reached in a few hours, in many places on the globe. The question which began to be asked at the time of the *Insular* cases "whether the Constitution follows the flag" arises today with increasing insistence. Is our fundamental law purely territorial, having no effect beyond our national boundaries? Are Constitutional protections against oppressive governmental action available to our people at home but unavailable abroad? Or is our Constitution a command governing our military and civilian officials wherever they go?

This Court had held recently in *Reid* v. *Covert*, 354 U. S. 1, that the Constitution does follow the flag in so far as it concerns ban of court-martial for dependents of military personnel for capital crimes overseas, and extended that doctrine in January 1960 in *Kinsella* v. *U. S.* and companion cases to ban of court-martial generally for civilian personnel of the armed forces.

The Court is now asked to speak concerning the Constitutional right of a loyal American citizen, residing in the United States, to fair compensation for her private property overseas occupied and damaged by the U. S. Forces.

The Third Amendment of our Bill of Rights reads:

> "No Soldier shall, in time of peace, be quartered in any house without the consent of the Owner, nor in time of war but in a manner to be prescribed by law."

Under the decision of the Court below, 80,000 American servicemen were quartered in Mrs. Kelly's private residence outside Paris, without her consent, and without U. S. responsibility for fair compensation to her for the damage wrought. Is this to be the law? Has the United States no responsibility under the Constitution to the American owner for said damage?

The Fifth Amendment provides that private property will not be taken for public use without compensation. It is fundamental in this country that the power of requisition of property even in time of war is subject to the constitutional prohibition of the Fifth Amendment against the taking of private property for public use without just compensation. The war power conferred upon Congress by the Constitution does not abrogate this constitutional guaranty, and it is not suspended or affected by war, and the right to compensation cannot be taken away by statute. Where property is requisitioned or confiscated for war purposes, the owner thereof is entitled to, and the government is obligated to pay, just and full compensation therefor (WAR, 56 Am. Jur. Sec. 33).

The Fourteenth Amendment provides that no citizen may be deprived by the Government of his property without due process of law. It is difficult to comprehend how a lawfully vested right can be divested by the Government without compensation and still fall within the traditional standards of due process.

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Do these guarantees, well enunciated in *U. S.* v. *Russell* (1870), 13 Wall (80 U. S.) 623, 20 L. ed. 474; *Mitchell* v. *Harmony*, 13 How. 134, stop at our national boundaries? Are they ineffective when the property of an American occupied and damaged by our military forces is in a friendly foreign country?

As early as 1867, the Court of Claims recognized in *Wiggins* v. *U. S.*, 3 C. Cls. 412, as urged by plaintiff in that case, that the "duty of the United States to protect the persons and property of its citizens is ubiquitous."

As Mr. Justice Black said in dissenting in *Johnson* v. *Eisentrager*, 339 U. S. 763, 798 (1950):

> "Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the seas as when our flag flew only over thirteen colonies."

This Court, in *Reid* v. *Covert*, *supra*, held (pp. 5-6):

> "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."

2) Of grave import, out of which may grow many abuses, is another question posed in this petition: Whether Congress intended, under the Lend-Lease Act, that our Army could demand that France furnish, as reverse lend-lease, the property of an American citizen, for the use and occupation of our Army, without responsibility of this country to the American owner for fair compensation for damages resulting therefrom?

The authority for the "taking" by France and furnishing of the chateau to us as reverse lend-lease, under the Eisenhower-Koenig agreement and the two previous agreements with the Fighting French and French Committee (A. VI, pp. 38-40), argued the Government, stemmed from the Lend-Lease Act of 1941 (55 Stat. 31), viz.:

> "Sec. 3(b) The terms and conditions upon which any such foreign government receives any aid authorized under sub-section (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or in other direct or indirect benefit which the President deems satisfactory."

The clearest language would be necessary to satisfy us that Congress intended that the power given to the President under the Lend-Lease Act should be so exercised. It was an arbitrary stretch of authority, contrary to the established law that "acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." *Phelps* v. *U. S.* (1927), 274 U. S. 341.

Whether Congress could have conferred the power to do such an act is a question we may also well consider. This Court has already stated in *Reid* v. *Covert*, *supra* (p. 14)

> "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate

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> within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribed. But we have no authority or inclination to read exceptions into it which are not there. * * * "

3) This raises a further question. Whether SOP No. 10F (Def. Exh. #10) constituted authority for the demand that France furnish, as reverse lend-lease, an American's private property for the use and occupation of our Army without obligation of the U. S. to the owner, in violation of the Constitution—as the Court below holds?

Congress in the Act of July 15, 1870 (16 Stat. 319, 10 U. S. C. 16, Sec. 20) authorized our President "to make and publish regulations for the government of the Army in accordance with existing laws which shall be in force and obeyed until altered or revoked by the same authority: Provided, that said Regulations shall not be inconsistent with the laws of the United States."

The principle laid down in *Dow* v. *Johnson* (1880), 100 U. S. 158, 169, 25 L. ed. 632, 636, bears repetition:

> " * * * the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend of the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield."

In *Duncan* v. *Kahanamoku* (1944, D. C. Hawaii), 66 F. Supp. 976, it was held:

> "Civil affairs and civil government extend, in operation of law, to the battle zone or military camps, even in time of war and, for many purposes, inside military reservations, particularly where civilians are concerned."

This Court in *Reid* v. *Covert, supra,* cautioned against unconstitutional seizure of power by the military, and said (pp. 39-40):

> "The attitude appears to be that a slight encroachment (by the Army) on the Bill of Rights and other safeguards in the Constitution need cause little concern. * * * but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

At the present time, the matter of the contents of the manuals of our military forces is receiving consideration by our Defense Secretary and the House Armed Services Committee to turn up "violations of law or conflicts with national or defense policy."

In the light of the above facts, the holding of the Court below that SOP No. 10F was authority for the "taking" and furnishing by France of an American's property without responsibility on the part of the United States for compensation to the owner, is untenable.

4) Congress has had under consideration for some time the necessity for a constitutional amendment, stating unequivocally that a provision of a treaty which conflicts with the Constitution is invalid, known as the Bricker Amendment. The latest version now before the Senate was introduced by Senator Dirksen.

Contrary to the decision of the Court below, we submit that the Eisenhower-Koenig agreement and the two preceding agreements with the Fighting French and French Committee could not and did not impair Mrs. Kelly's constitutional right to fair compensation from the United States for her damages.

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Treaty law and executive agreements cannot override fundamental constitutional guarantees, and the United States cannot by treaty or executive agreement with a foreign government—or between commanders in the field—divest itself of its obligation to pay an American citizen fair compensation for the occupation and damage of her property or abridge substantive individual rights. To that extent, such treaty or executive agreement, it has been held, is null and void.

This Court indicated almost a century ago that a treaty provision conflicting with the Constitution would not be given effect as domestic law.

Mr. Justice Field in *Geofroy* v. *Riggs*, 133 U. S. 258, 267 (1890) said:

> "• • • It would not be contended that it (the treaty power) extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or accession of any portion of the territory of the latter, without its consent."

In *Doe* v. *Braden*, 16 How. 635, 657 (1853), it was stated:

> "The treaty is therefore a law made by the proper authority and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States."

and in *The Cherokee Tobacco*, 11 Wall. 616, 620-621 (1870), the Court said:

> "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the

> nature and fundamental principles of our Government. * * * "

The doctrine of the *Geofroy* v. *Riggs* case, *supra*, was reaffirmed by this Court in *Reid* v. *Covert*, *supra*, at page 17.

In concluding that under the decisions there was no need for the Bricker Amendment, the New York Bar Association and many other authorities relied to a large extent on the decision of the Court below in 1955 in *Seery* v. *United States*, 130 C. Cls. 481. The Court of Claims in that case, in passing upon an agreement made in Austria between Lt. Gen. Geoffrey Keyes, the U. S. High Commissioner, and Chancellor Fiegl of Austria, under which the Austrian Government had agreed for a lump sum to settle or adjudicate damage claims and guarantee full protection to the United States against such claims, held:

> "Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights."

(See also *Turney* v. *U. S.*, 126 C. Cls. 202). Thereupon, the Government was held to be responsible for damages to the private property in Austria of Mrs. Seery, a loyal American citizen, by the U. S. Forces.*

Yet the Court below has reversed itself in the instant case despite the *Reid* v. *Covert* decision. Surely, a conflict of this magnitude in the decisions of the Court of Claims should be resolved. A ruling by this Court as to the inva-

* Petition for certiorari in the *Seery* case, addressed to the amount of damages awarded, was denied by this Court in 1959.

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lidity of unconstitutional provisions in treaties and executive agreements would be of guidance to the legislature.

5) In the absence of a rejection of her claim, and by reason of the Government's representations and directions to Mrs. Kelly (Statement of Facts, pars. 5-15) upon which she relied and acted, that her claim was one falling within the terms of the Reciprocal Aid Claims Agreement (which formed the basis for the Mutual Aid Settlement Agreement), and its referral by the U. S. to France, we respectfully submit that the Government is estopped from repudiating its representations and directions to her, to her detriment, and invoking the Statute of Limitations.* The Government may not, even innocently, mislead a citizen and then claim the benefit of its deception.

**Expressed Congressional Intent**

Congress has been sedulous in guarding our Constitutional rights. In June of 1941, in the debate on the Requisitioning Act of 1941 (Conf. Report of June 30, 1951) Hon. Merwin K. Hart declared: "I submit that these inalienable rights, the enjoyment of property, built up over a thousand years, ought not to be thrown away, or even placed in jeopardy, by a stroke of the pen."

Under the Foreign Claims Act, as amended in 1954 and 1956, implemented and made reciprocal by the Nato Status

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* *Walker* v. *U. S.*, 139 Fed. Rep. 409; *Triple Cities Constr. Co.* v. *Maryland Casualty Co.*, (decided June 25, 1958) 4 New York Reports, 2d Series, 443, 448; *Dayton Airplane Co.* v. *U. S.*, 21 F. (2) 675; *U. S.* v. *Taylor*, 104 U. S. 216, 221; *Schenley Import* v. *U. S.*, 129 Ct. Cls. 327, 121 F. Supp. 646; *U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1; *First National Bank* v. *U. S.*, 2 F. Supp. 107; *U. S.* v. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 40; *Ritter* v. *U. S.*, 3 Circuit 28 Fed. 2nd 265; *U. S.* v. *Denver & R. G. W. R. Co.*, 10 F. 2nd 374; *State of Iowa* v. *Carr*, 191 Fed. 257, 265; *Romano* v. *Metropolitan Life Ins. Co.*, 271 N. Y. 288; *U. S.* v. *Lippert*, 100 U. S. 663.

of Forces Treaty, an American citizen, whose property of a value of less than $15,000. in France, the United States, or any other of the Nato countries, is damaged by foreign Nato country troops, may look to the United States for payment of fair compensation, in which event the United States will be responsible for 25% of the compensation paid and collect from the Nato country whose troops did the damage 75% thereof (A. 40-4).

Congress, while enacting legislation and agreements to protect an American's property here and abroad from foreign troops found no necessity to protect it from our own military in the belief evidently that the Constitution was adequate. In fact the Senate Report thereon, No. 2324, indicates that in the event of damage here or abroad by foreign Nato troops, the American citizen may proceed against our Government in the same manner as if the damage had been caused by a member of our Government's forces.

Mrs. Kelly's claim having accrued in 1944 by reason of damage by U. S. troops (not foreign troops), and being above $15,000 does not come under the Foreign Claims Act. However, the history of administrative procedure under the Foreign Claims Act is interesting and pertinent (Def.'s Exh. #25). The U. S. Claims Section bogged down in administration thereof in Great Britain, the first country occupied, due to conflict with the laws of Great Britain relating to subrogation, contributory negligence, etc. Ill-will developed, which came near to defeating the very purpose of the Act. A determination was thereupon made that Great Britain would handle the processing, settling and payment of claims of its nationals under the Act, as reverse lend-lease and account therefor to the United States. This worked well, and when the U. S. Forces landed in France, the similar arrangement with France became even more expeditious by eliminating language difficulties. It was then arranged that France, in addition to the handling of the damage claims of its nationals, would procure and furnish the supplies,

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services and facilities required for the U. S. Forces, as reverse lend-lease, and account therefor, under the Eisenhower-Koenig agreement.

Claims under the Foreign Claims Act were limited to $5,000; and real estate procurement was limited to payment of rental and damage from normal wear and tear. But larger damages had accrued, and in December 1944, General Eisenhower and the Department of State exchanged cables (Def.'s Exh. #13) for authority to the French to settle, as reverse lend-lease, damage claims above $5,000 without limit, later implemented by the Reciprocal Aid Claims Agreement, and par. 6(c) of the Mutual Aid Settlement Agreement. Under Article VII of the latter agreement, France agreed to accord to American nationals the same benefits accorded to its French subjects.

In its argument before the Commissioner, the Government referred to the recognition by the United States of the sovereignty of France upon its liberation,* and its right as such to seize American private property within its territorial borders without question. In view of the above, we do not believe that the question of sovereignty was a controversial factor.

The fact is that France's sovereignty was not transferred by reason of the occupation, and recognition of her sovereignty was unnecessary. However, the *right of control* passed to our Army as an occupying force.** Nothing

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* Paris was liberated on August 25, 1944; plaintiff's property was occupied on October 17, 1944; the Battle of the Bulge was still to come, and France was thereafter liberated on or about January 31st, 1945. (World Almanac)

** *United States Army and Navy Manual of Military Government and Civil Affairs*, December 22, 1943 (FM27-5). Repeated in FM27-5 of October 1947, pp. 2-3.

p. 1 "The term 'military government' is used in this manual to describe the supreme authority exercised by an armed force

has been produced evidencing any authority to the Army to surrender not only its right of control but, as well, the Constitutional guarantees to American citizens.

6) The Mutual Aid Settlement Agreement (based on the Reciprocal Aid Claims Agreement) was, as its name implies, a settlement of the lend-lease account, under which America added up what she had given to France as lend-lease and France totaled up what it had furnished as reverse lend-lease, and a final settlement was made of the account. Adjustments were subsequently made as to some of the lump sum settlements by agreements on February 27, 1948 and March 14, 1949 (62 Stat. 3826; 63 Stat. 2499, 2507).

Mrs. Kelly's property, an item of reverse lend-lease, was thus a part—if only a minute part—of the astronomical calculations settled by the Mutual Aid Settlement Agreement, and therefore *was* a claim falling thereunder, as correctly represented to her by the Government authorities.

Prof. Michael M. Cardozo, one of the prime negotiators of said agreement, testified that it was never intended by the negotiators that said agreement would violate Constitutional rights of American claimants; that no discharge of the obligation of the United States was contained therein; that the claimant was simply directed to deal first with France but if not satisfied could then look

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over the lands, property, and the inhabitants of enemy territory, or allied or domestic territory *recovered from enemy occupation*, or from rebels treated as belligerents. It is exercised when an armed force has occupied such territory, whether by force or *by agreement*, and has substituted its authority for that of the sovereign or a previous government. Sovereignty is not transferred by reason of occupation *but the right of control passes to the occupying force*, limited only by international law and custom. * * *" (Emphasis ours.)

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to the United States. Before testifying, Prof. Cardozo had written and published an article on the subject (Pltf.'s Exh. #28).

The principle of agency (or creditor beneficiary), we contend, was express or implied in the Byrnes-Blum Agreement under the Constitution and the Statute tolled.

This concept of agency (creditor beneficiary) was carried forward by our Legislative Department in the Foreign Claims Act Amendments and Nato Agreements. Further, our Executive Department evolved a series of agreements with 45 foreign countries, stemming from the same principle, guaranteeing investments of American citizens against expropriation, initiated by the Economic Cooperation Act of 1948 (TIAS Accession List, February 4, 1960; TIAS 3900), thus indicating the extent to which our Legislative and Executive Departments have committed the United States to the protection of American private property overseas. Yet, in disregard of this trend and its own decisions in the *Seery* and *Turney* cases, the U. S. Court of Claims has reversed itself in the instant case.

Questions have been raised herein which are of paramount importance and which should be settled.

## CONCLUSION

**It is respectfully prayed that the petition for certiorari be granted.**

Respectfully submitted,

GUSTAVE I. JAHR,
*Attorney for Petitioner.*

GUSTAVE I. JAHR,
*of Counsel.*

## APPENDIX I

## IN THE UNITED STATES COURT OF CLAIMS

No. 505—55

(Decided July 13, 1959)

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## SARAH HUNTER KELLY v. THE UNITED STATES

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*Mr. Gustave I. Jahr* for the plaintiff.

*Mr. Kendall M. Barnes*, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

JONES, *Chief Judge*, delivered the opinion of the court:

Plaintiff, a native-born American citizen, claims that she is entitled to just compensation from the United States Government for the use, and damage incident to such use, of her French castle by the military forces of the United States. The alleged period of requisition and use was from October 17, 1944, to August 25, 1945. The plaintiff also claims as creditor-beneficiary under an Executive agreement between the United States and France entered into on May 28, 1946,[1] it being asserted that she was only par-

[1] Known as the Byrnes-Blum Agreement. See Treaties and Other International Acts, Series 1928, U. S. Department of State Publications 3557, p. 43. There was a second Byrnes-Blum Agreement signed the same day, but since it covered claims of French residents only, it would have no application to plaintiff who is an American citizen.

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tially paid by the French Processing Agency,[2] and that defendant because of its alleged primary obligation, is liable for the balance.

This case came before this court on defendant's motion to dismiss on the ground that both phases of plaintiff's claim were barred by the statute of limitations.[3] After argument, the case was referred to a trial commissioner under a limited reference described in the findings of fact. Thereafter, the original motion to dismiss was itself dismissed without prejudice. Following the filing of the trial commissioner's report on the limited reference, defendant again moved to dismiss and the matter is now before the court on the second motion.

Evidence was adduced before the trial commissioner on the basis of which he found and the court adopts his findings that the plaintiff's property was taken by French authorities under the laws of France. The questions propounded in the limited reference are thereby rendered moot.

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[2] The claim was referred, over plaintiff's protest, by the Army officials to the French authorities pursuant to the Reciprocal Aid Claims Agreement between the two countries, by the terms of which France agreed to process and pay claims of the character involved here. The French authorities made three payments totaling $51,405.13. The plaintiff agreed to accept the balance in negotiable French Government bonds, which plaintiff alleges have never been delivered.

[3] The petition was filed on December 28, 1955, more than 10 years after the use of the property ended and the castle was returned to the plaintiff. By the terms of Title 28, United States Code, section 2501, the action is barred by the statute of limitations unless the allegations of the petition, if accepted as true, show that the statute has been tolled. The plaintiff urged that the action of the United States Government in referring the claim to the French Processing Agency for settlement had the effect of tolling the statute, and that the payments by the French Government had the effect of renewing or reinstating the obligation. We need not reach this issue in view of our finding that the property was not taken by the United States.

It follows that plaintiff is not entitled to recover, and the petition will be dismissed.

It is so ordered.

LITTLETON, *Judge, (Ret.)*; LARAMORE, *Judge;* MADDEN, *Judge;* and WHITAKER, *Judge,* concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows:

The petition in this case, filed on December 28, 1955, asserted a claim for just compensation, for the alleged taking of plaintiff's[4] French chateau by United States military force in October 1944.

On February 27, 1956, defendant filed a motion to dismiss on the ground that the claim was barred by limitations. This motion was argued and submitted at the October Term, 1956. The order of limited reference was issued on November 27, 1956.[5]

The order posed two questions[6] and closed with the following provision:

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[4] Plaintiff alleges that she is a native American citizen resident in the United States at the time of the use and occupancy of her property in France.

[5] This order was amended on February 12, 1958, to dismiss defendant's motion without prejudice, the order to stand in all other respects.

[6] "1. Under what statute, executive order, or other authority did the American officials (of the Claims Liaison Section of the United States Forces and of the Department of State) act in making the agreement that France would process claims of American nationals who had suffered damage in France from causes originating in the war, and compensate them?

"2. What letters or memoranda were exchanged between representatives of the two governments while negotiating, making or carry-

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> The parties may stipulate the facts or they may submit evidence relating to these questions to the commissioner to whom the case has been referred, and he shall submit his findings thereon in due course.

The parties were unable to stipulate. On October 4, 1957, plaintiff filed a motion for call upon the Department of State.[7] Following a conference between counsel for the parties and the commissioner on November 1, 1957,[8] a trial session was scheduled for December 12, 1957.

Evidence was taken on December 12 and 13, 1957, in the course of which the purpose of the session[9] was broadened to permit either party to present evidence in conformity with the court's order of reference.

Evidence was adduced which establishes the fact that the property was taken by French authorities under the laws of France. Questions relating to an alleged taking by the United States were thereby rendered moot.

The facts in summary form are as follows:

On April 1, 1944, in anticipation of landings on the continent of Europe, Headquarters, European Theatre of Op-

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ing out such agreement which would bear on the question of whether such American officials had intended to make the French government the agent of the United States in carrying out such agreement and to what extent it was intended by them that the United States should be bound by any action that might be taken by the French government in processing such claims?"

[7] On January 10, 1958, plaintiff's motion of January 8 for leave to withdraw the motion for call was allowed.

[8] The purpose of the conference was to attempt to narrow the search by defendant, if plaintiff's motion for call should be allowed.

[9] The initial purpose of the session was to assist in the endeavor to narrow the search to be made pursuant to the call.

erations, issued Standard Operating Procedure No. 10, entitled "Procurement Regulations in Occupied and Liberated Territories." This SOP provided that "the acquisition of the use of real estate (land and/or buildings) either by rental, requisition or seizure, is an Engineer function * * *," and laid down a series of principles for the guidance of Engineer officers.

The SOP was amended on July 1, 1944, to provide that "wherever possible, procurement in liberated territories will be effected by requisitioning through local civil officials in accordance with local law, and payment thereon will be deferred until Reciprocal Aid or other agreements have been negotiated with the government concerned * * *."

As of the end of July 1944, all direct procurement of the use of real estate in France by United States Forces was discontinued, and the responsibility for such procurement was assumed by French authorities.

Thereafter, agreements between the United States and various French authorities extending from the government-in-exile (Algiers) to the Provisional Government of the Republic of France were continually refined. On August 7, 1944, the government-in-exile issued a document entitled "Aid to Allied Forces, General Instruction No. 1," which assumed that the French Government "will be charged with furnishing these armies [Allied] with the supplies, facilities and services they may require." On August 24, 1944, the French Government issued further instructions and promulgated forms for use in making demands upon French authorities. One of the forms was designated Form No. 101 and entitled "Demand-Mutual Aid." Another was Form No. 102, entitled "Mutual Aid-Receipt."

On September 23, 1944, the Army issued Standard Operating Procedure No. 10F, entitled "Field Procurement by United States Forces in France." By the terms of SOP

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No. 10F, the initial SOP No. 10 was withdrawn and superseded and, with respect to real estate, Engineer officers were instructed to make their demands upon French authorities on Forms No. 101 and to obtain from the French authorities receipts (for mutual aid) on Forms No. 102.

Plaintiff's property was occupied by United States Forces on October 17, 1944. On that date a request for the property was given to the appropriate French authorities on Form No. 101, and a joint survey of the property was made by representatives of France and of the United States.[10]

There is no evidence of any authority under which United States Forces might have acted in occupying the premises other than SOP No. 10F and the agreements between the United States and the Republic of France upon which the SOP was based.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is therefore dismissed.

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## APPENDIX II

RECIPROCAL AID CLAIMS AGREEMENT

59 Stat 1314-7—Pltf.'s Exh. 6

On February 28, 1945, Mutual Aid Agreements between the United States of America and France were entered into, signed at Washington, including "Agreement Relat-

[10] For reasons not disclosed by the evidence a further request for the use of these premises, on Form No. 101, was served on the Mayor of Mereville on February 27, 1945.

ing to Principles Applying to Mutual Aid in the Prosecution of the War against Aggression and Agreement Relating to Supplies and Services, and Agreement Relating to Principles applying to the Provision of Aid to the Armed Forces of the United States," retroactive to June 6, 1944. Attached thereto is a letter, dated February 28, 1945, of French Ambassador H. Bonnet to the Acting Secretary of State, which reads:

"1. The Provisional Government of France, retaining the right of final decision, in the light of its own potentialities and responsibilities, will provide the United States or its armed forces with the following types of assistance as reciprocal aid, when and to the extent that it is found that they can most effectively be procured in continental France.

• • •

(D) Settlement and payment of appropriate civil claims arising in French territory against the United States and its armed forces, employees, and officers.

• • •

3. It is the understanding of the Provisional Government of France that all such aid * * * accepted by the President of the United States or his authorized representatives from the Provisional Government of France will be received as a benefit to the United States under the Act of March 11, 1941. Insofar as circumstances will permit, appropriate record of aid received under this arrangement will be kept by each Government.

• • •"

The United States, however, reserved its right to act in accordance with its constitutional procedures in the imple-

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mentation of said agreement, for the Memorandum of the Department of State to France attached to said agreement, dated February 28, 1945, reads in part as follows:

> "It is, of course, understood that in the implementation of the provisions of the Lend Lease Agreements submitted to the Provisional Government of the French Republic, the Government of the United States will act in accordance with its constitutional procedures."

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## APPENDIX III

### Mutual Aid Settlement Agreement

61 Stat 4210—

On May 28, 1946, "Declaration by the Government of the United States of America and the Provisional Government of the French Republic on Commercial Policy and Related Matters" was entered into, signed by James F. Byrnes for the United States and Leon Blum for the French.

Article VII thereof reads:

> "The French Government will accord to American nationals who have suffered damage to their properties in France, through causes originating in the war, compensation equal to that payable to French nationals having the same types and extent of losses. The United States Government has informed the French Government that equality of treatment is accorded to French and American nationals with reference to war damages to property in the United States."

# APPENDIX IV

## Mutual Aid Settlement Agreement

61 Stat 4175

On May 28, 1946, a "Memorandum of Understanding between the Government of the United States of America and the Provisional Government of the French Republic Regarding Settlement for Lend-Lease, Reciprocal Aid, Surplus War Property, and Claims" was entered into, signed by James F. Byrnes for the United States and Leon Blum for the French. Paragraph 6(c) reads:

> "6. The two Governments have also agreed upon the following:
>
> • • •
>
> c) As part of the general settlement, the French Government has agreed to process and pay all unpaid claims of French residents against the United States Government arising out of the use or infringement in war production of patent rights held by them, *out of the requisitioning by the United States Government for use in the war program of any property interest owned by French residents,* and out of acts or omissions prior to July 1, 1946, in France or French overseas territories of members of the United States Armed Forces or civilian personnel attached to such Forces." (Emphasis ours.)

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## APPENDIX V

### Civil Administration and Jurisdiction in Liberated French Territory

TIAS 2313—Def.'s Exh. #6

On August 25, 1944, in Algiers, a letter agreement was signed by General Dwight D. Eisenhower, United States Army, Commanding General, U. S. Army Forces, European Theater of Operations, addressed to General of the Army Koenig, Chief of the French Military Mission. It is to be noted that although General Eisenhower was Supreme Commander of the Allied Forces, the letter agreement was signed in his capacity as a U. S. Army General.

To said letter were appended "four memoranda of arrangements with respect to civil affairs administration in France." The following excerpt is relied upon by the Government:

> "17. (i) The Allied Forces may obtain, within the limits of what is available, the supplies, facilities and services which they need for the common war effort.
>
> (ii) At the request of the Supreme Allied Commander, the French authorities will requisition, in accordance with French law (in particular as regards prices, wages, and forms of payment), supplies, facilities and services which the Supreme Allied Commander determines are necessary for the military needs of his command. However, in the exceptional cases provided for in Article 4(ii) above, the right of requisition is delegated to the Supreme Allied Commander, who will exercise it in accordance with current French prices and wages.

(iii) In order that the satisfaction of the local requirements of the Allied Armed Forces may have least possible disruptive effect on the economy of France, the Allied military authorities and the French authorities will consult together, whenever operations permit, as to the stores, supplies and labour which procurement agencies and individual officers and men of the Allied Forces are permitted by the Supreme Allied Commander to obtain locally by requisition, purchase or hire. The Allied military authorities will place such restrictions as are agreed to be necessary on purchases whether by agencies or troops.

(iv) The French and Allied military authorities shall jointly take the measures necessary to ensure that the provisions of this Article are carried out."

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## APPENDIX VI

56 Stat. 1614

On September 3, 1942, pursuant to the Lend-Lease Act, an agreement was entered into "between the United States of America and Fighting France respecting principles governing the provision of reciprocal aid in the prosecution of the war, effected by exchange of notes signed at London". It was provided therein:

"4. * * * It is accordingly the Committee's understanding that the United States Government will provide in accordance with the Act of March 11, 1941, the share of its war production made available to Fighting France. Fighting France will provide on the same terms and as reciprocal aid as much of its war production made available to the United States as it authorizes in accordance with the principles enunciated in the letter.

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5. Within territories under the control of Fighting France or within the same theatre of operations, the National Committee will provide * * * the following types of assistance as such reciprocal aid when it is found they can most effectively be procured in territory under the control of Fighting France.

* * * * *

(B) Other supplies, materials, facilities and services for the United States forces * * *.

6. The practical application of the principles formulated * * * shall be worked out by agreement as occasion may require * * *. Requests by the United States forces for such aid will be presented by their duly authorized authorities to official agencies of Fighting France * * *.

7. * * * In so far as circumstances will permit, appropriate record of aid received under this arrangement, except for miscellaneous facilities and services, will be kept by each."

59 Stat. 1666

On September 25, 1943, an agreement was entered into "between the United States of America and the French Committee of National Liberation respecting mutual aid in French North and West Africa, signed at Algiers," entitled "Modus Vivendi on Reciprocal Aid in French North and West Africa." It was stated:

"IV.—Adequate statistical records will be kept of all goods and services exchanged as mutual aid under paragraphs I and II above.

V.—The provisions of this modus vivendi correspond to a desire to reduce to an appropriate minimum the need of either party for currency of the other party * * *."

"United States Treaty Developments" (Vol. I, E. A. S. 483) contains the following notation as to this agreement:

> "Modus Vivendi of Reciprocal Aid in French North and West Africa replaced by the agreement of February 28, 1945. *The disposition of claims arising out of the modus vivendi of September 25, 1943 is dealt with in the U. S. French War Settlement Committee Agreed Combined Statement with Respect to Claims of May 28, 1946 [the Byrnes-Blum Agreement].*"

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## APPENDIX VII

### Foreign Claims Act and Amendments

Public Law 393, 77th Congress, Ch. 645, 1st Session, Jan. 2, 1942.

The statute was enacted for the express purpose of:

> "promoting and maintaining friendly relations by the prompt settlement of meritorious claims * * * on account of damages caused by Army, Navy and Marine Corps Forces, or individual members thereof, in a foreign country * * * to the property, public or private, or the persons of inhabitants of such foreign countries, where the amount of such claim does not exceed $1,000."

Expressly excluded from benefits thereunder were Army, Navy and Marine Corps personnel, nationals or citizens of foreign countries at war with the United States, and United States citizens not permanent residents of the foreign countries involved.

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Amendment: Public Laws (57 Stat. 66), Ch. 67—Apr. 22, 1943

To cover claims up to $5,000 and acts not only of members of the U. S. Armed Forces but civilian employees thereof as well. It also provided for the inclusion of:

> "claims for damage to or loss or destruction of personal property bailed to the Government and *claims for damages incident to the use and occupancy of real property, whether under a lease, express or implied, or otherwise, when such damage, loss, destruction,* or injury *is caused by Army,* Navy, or Marine Corps *forces,* or individual members thereof, including military personnel and civilian employees thereof, or otherwise incident to noncombat activities of such forces * * *."

---

Amendment: Public Law 734, Ch. 1152—Aug. 31, 1954, 83rd Congress, 2nd Session

> "Pursuant to the terms of those international agreements to which the United States is now or may hereafter be a party which provide that certain claims against the United States arising out of acts or omissions in the performance of official duty in a foreign country of civilian employees of the Armed Forces, or military personnel, of the United States may be adjudicated by such foreign government in accordance with the laws and regulations of such foreign government, the Secretary of Defense is hereby authorized—
>
> a) to reimburse such foreign government for the agreed pro rata share of such sums as may be expended by such foreign government for the payment of such claims; or

b) to pay to such foreign government an agreed pro rata share of claims arising out of damage to the property of such foreign government * * *."

The above is reciprocal. Senate Report #2324 on said amendment (Legislative History, pp. 3570-1) clarifies said language: Said report reads:

> "These claims are particularly troublesome, because they involve claims of citizens of one country against a foreign government and frequently give rise to bad feeling. * * *
>
> In recent years, negotiations have been under way to arrive at internationally agreed on methods of settling claims of this nature. * * *
>
> These treaties and agreements provide that if a member of the military forces, or of their civilian components, of one state in the territory of another causes damage to third parties in the performance of duty, the injured party will proceed against his own government in the same manner *as if the damage had been caused by a member of that government's forces.* (Emphasis supplied.)
>
> The host government will settle the claim under its own procedure and the sending government will reimburse it for an agreed percentage of the settlement. In most cases, the host government will pay 25 per cent of the cost and the sending government 75 per cent. * * *
>
> For example, if an American soldier driving a jeep on duty in France injures a Frenchman, the claim is settled by the French government as though the injury had been inflicted by a French soldier. * * *

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Conversely, if a French soldier driving a jeep on duty in the United States injures an American, the claim is settled by the Defense Department as though the injury had been inflicted by an American soldier. * * * "

---

Amendment: Public Law 827, Ch. 769, 84th Congress, 2nd Session, July 28, 1956.

"The Act of January 2, 1942 * * * as amended, is further amended by—

(1) amending the first section by deleting the words 'arising in such foreign country' and inserting in lieu thereof the words 'arising outside of the United States, its Territories and possessions'. * * * "

Senate Report #2718 on said amendment (Legislative History, pp. 3611-3) clarifies the intent:

"The purpose of this legislation is to further amend the Act of January 2, 1942, generally referred to as the Foreign Claims Act. This act, as amended, authorizes the Secretary of a military department to appoint commissions to settle claims against the United States where military or civilian personnel of that department have caused property damage, injury, or death to inhabitants of any foreign country. One of the requirements in the act is that the person must have sustained the property loss, injury, or death in the country of which he is an inhabitant. If the claim arises in a foreign country of which the claimant is not an inhabitant, there is no authority for an administrative settle-

ment. For example, a French inhabitant may be paid if he is injured in France, but he cannot be paid if he is injured in Belgium, or some other foreign country. Section 1(1) of this proposal would eliminate this situation by deleting from the act the words 'arising in such foreign country,' and substituting therefor the words 'arising outside of the United States, its Territories and possessions'."

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 8 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Basso* v. *United States*, 239 U.S. 602 | 6 |
| *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 | 7 |
| *Finn* v. *United States*, 123 U.S. 227 | 7 |
| *Herrera* v. *United States*, 222 U.S. 558 | 6 |
| *Hooe* v. *United States*, 218 U.S. 322 | 6 |
| *Juragua Iron Co.* v. *United States*, 212 U.S. 297 | 6 |
| *McMahon* v. *United States*, 342 U.S. 25 | 7 |
| *Munro* v. *United States*, 303 U.S. 36 | 7 |
| *Schillinger* v. *United States*, 155 U.S. 163 | 6 |
| *Soriano* v. *United States*, 352 U.S. 270 | 7 |
| *United States* v. *North American Co.*, 253 U.S. 330 | 6 |
| *United States* v. *San Francisco*, 310 U.S. 16 | 7 |
| *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 | 7 |
| *Wilber National Bank* v. *United States*, 294 U.S. 120 | 7 |
| Constitution and Statutes: | |
| Constitution of the United States: Fifth Amendment | 4 |
| Act of June 25, 1948, ch. 646, 62 Stat. 976, as amended, 28 U.S.C. 2501 | 2, 7 |
| 28 U.S.C. 1491 | 6 |

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

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No. 751

SARAH HUNTER KELLY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 28-33) is not yet reported.

### JURISDICTION

The judgment of the Court of Claims was entered on July 13, 1959 (Pet. App. 28), and petitioner's motion for a rehearing was denied on December 2, 1959 (R. 85). The petition for a writ of certiorari was filed on March 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTIONS PRESENTED

1. Whether the determination of the Court of Claims that petitioner's property was taken by French authorities under the laws of France and not by the United States is sustained by the evidence.

2. Whether petitioner's claim is barred by the six-year statute of limitations.

## STATUTE INVOLVED

The Act of June 25, 1948, ch. 646, 62 Stat. 976, as amended, 28 U.S.C. 2501, provides in part as follows:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * *

## STATEMENT

Petitioner, an American citizen, purchased a chateau in France in 1927 (R. 1). For a time she occupied the chateau, but in 1933 she returned to live in the United States and in 1937 removed most of her personal property from the premises (R. 3-4).

In 1939 the chateau was requisitioned by the French Government, and, after France fell, by the German Army (Pltf's Exh. 13). In 1944 the property again was taken by French authorities under the laws of France (Pet. App. 29, 31) and turned over to the American Army. The American forces occupied the chateau from October 17, 1944, to August 25, 1945 (Pet. App. 28; R. 4). Petitioner alleges

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that after the successive occupancies of the French, Germans, and Americans the chateau was badly damaged (R. 4-5).

After the war petitioner filed a claim for $500,000 damages with Headquarters, United States Forces, European Theatre, Claims Liaison Section, APO 887 (R. 5-6). That office promptly referred her claim to the appropriate French official (Pltf's Exh. 1; R. 19). Petitioner thereafter negotiated with the French Government for settlement of her claim and in 1951 entered into an accord with that Government whereby she agreed to accept 16,000,000 French francs in complete satisfaction of her claim for damages to the chateau (Pltf's Exh. 27A, 27B). Petitioner was in fact paid 16,000,000 French francs by the French Government (Pltf's Exhs. 29, 30, 32; R. 11, 20-27, 31-33). A dispute arose, however, as to whether petitioner was entitled to an additional sum to compensate her for the depreciation of the franc.

When no further payments from the French Government were forthcoming, petitioner instituted this action against the United States in the Court of Claims on December 28, 1955 (R. 1). The primary theory of the petition was a claim for just compensation (R. 1-13). The amount claimed was the difference between the actual dollar equivalent of the 16,000,000 French francs petitioner received under her accord with the French Government and the dollar value of 16,000,000 French francs at the rate of exchange existent on August 1, 1945 (R. 10, 13, 14).

The case was referred to a trial commissioner under a limited reference posing two questions bearing on certain theories advanced by petitioner in order to overcome the bar of the statute of limitations (R. 37). During the course of a two-day hearing, 194 pages of testimony were elicited from three witnesses, and 52 exhibits were received into evidence. The trial commissioner found as a fact that the chateau had been taken by French authorities under the laws of France (Pet. App. 29, 31).

On motion by the Government to dismiss, the Court of Claims adopted the trial commissioner's findings and dismissed the petition on the ground that petitioner's property was taken by the French authorities under the laws of France (Pet. App. 29).

## ARGUMENT

1. Petitioner's suit for just compensation was dismissed by the Court of Claims on the basis of its determination that her property "was taken by French authorities under the laws of France" (Pet. App. 29), and therefore not by the United States. This finding is, of course, dispositive of petitioner's claim for just compensation under the Fifth Amendment. Although petitioner suggests the contrary (Pet. 2-3), we submit that the record in this case presents only the single question whether the critical determination by the court below is sustained by the evidence. This question clearly does not warrant review by this Court.

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The finding of the Court of Claims, not directly challenged by petitioner, is grounded upon the executive agreement of August 25, 1944, whereby the Provisional Government of the Republic of France agreed, upon request of the Supreme Allied Commander, to "requisition, in accordance with French law * * * facilities * * * which the Supreme Allied Commander determines are necessary for the military needs of his command" (Pet. App. 37). By Supplementary Agreement of the same date (Deft's. Exh. 7; Tr. 84-86), it was stipulated by the Allied Command that it would make its demands in writing upon the appropriate French authority specifying the nature of the facilities requested. The French Government issued its Form No. 101 to be used by Allied Officials in making demands upon French authorities (Pet. App. 32). Shortly thereafter the Army issued Standard Operating Procedure No. 10F, entitled "Field Procurement by United States Forces in France," instructing engineer officers to make their demands upon French authorities for real estate on Form No. 101 (Pet. App. 32-33). There is, as the Court of Claims stated (Pet. App. 33), no evidence of any authority under which United States forces might have acted other than SOP No. 10F and the agreements between the United States and France upon which the SOP was based (Pet. App. 33). And, as found by the Court of Claims (Pet. App. 33), before occupying petitioner's premises on October 17, 1944, the Army formally requested, by means of a Form

No. 101, that French Authorities make petitioner's chateau available for Allied use. The fact that the French Government requisitioned the chateau at the request of the American army authorities does not make the requisitioning any the less the act of the French Government.

Petitioner, unable to cite any evidence that invalidates the finding below, attempts to attack it (Pet. 15-23) by challenging the validity of Standard Operating Procedure No. 10F and the executive agreements between the United States and the French Government upon which it is based. But even if this contention were sound (which we deny), it would not aid petitioner. For, as the Court of Claims found, the taking was the act of the French Government, not of the United States, and the alleged invalidity of SOP No. 10F could not change that fact. Moreover, if SOP No. 10F were invalid, the Army then acted without authority in requesting the French officials to requisition the chateau. In such circumstances, petitioner's only claim would be one sounding in tort and therefore would be beyond the jurisdiction of the Court of Claims. 28 U.S.C. 1491; *Schillinger* v. *United States*, 155 U.S. 163, 168; *Basso* v. *United States*, 239 U.S. 602; *Hooe* v. *United States*, 218 U.S. 322, 335; *United States* v. *North American Co.*, 253 U.S. 330, 333, 334; *Herrera* v. *United States*, 222 U.S. 558, 573; *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 310.

2. Apart from the dispositive finding that the taking of petitioner's chateau was by the French Govern-

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ment, the applicable six-year statute of limitations stands as a jurisdictional bar to the maintenance of this suit no matter on what theory petitioner proceeds. 28 U.S.C. 2501, *supra*, p. 2.

Petitioner's suit was not brought until 1955 on a cause of action which accrued, if at all, not later than 1945. And there is no merit to petitioner's several theories (Pet. 3, 8, 11, 23, 27) whereby she seeks to avoid the bar of limitations. If petitioner's negotiations with the French Government for compensation prior to this action can be likened to the pursuit of an administrative remedy, the limitation period nevertheless continued to run. *Soriano* v. *United States*, 352 U.S. 270; cf. *McMahon* v. *United States*, 342 U.S. 25. Or if, *arguendo*, the French Government processed petitioner's claim as an agent of the United States or if petitioner was led by American Government officials to believe that she must look first to France for redress, the answer is that the statute of limitations is jurisdictional and cannot be waived (*Munro* v. *United States*, 303 U.S. 36; *Finn* v. *United States*, 123 U.S. 227, 232-233), or that the United States is not, in any event, estopped by the improper acts or erroneous representations of its agents. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380; *United States* v. *San Francisco*, 310 U.S. 16, 32; *Wilber National Bank* v. *United States*, 294 U.S. 120; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

# Supreme Court of the United States

October Term, 1959

No. 751

SARAH HUNTER KELLY,

*Petitioner,*

v.

THE UNITED STATES

## PETITIONER'S BRIEF IN REPLY

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 751

SARAH HUNTER KELLY,

*Petitioner,*

v.

THE UNITED STATES

## PETITIONER'S BRIEF IN REPLY

The Government in its opposing brief has posed two questions, to which petitioner herewith replies:

AS TO QUESTION #1. The determination of the Court below that Mrs. Kelly's property was taken by French authorities under the laws of France, and not by the United States, is *not* sustained by the valid evidence, which is set forth in paragraphs 1-31, pp. 3-15, of the Petition for Writ of Certiorari.

The finding of the Court of Claims was erroneous, for the following reasons:

(a) SOP No. 10F (Def. Exh. 1, 2, 10), heavily relied upon by the Court below, did not authorize the Army, in violation of the Constitution, to demand that property of American citizens be taken by France and furnished to our Army as reverse lend-lease, without American

responsibility to the American owner for fair compensation. Nor did Congress intend in the Lend-Lease Act to confer this authority. The Court is referred to Questions 2 and 3, pp. 2, 17-20, of Petition for the Writ.

(b) The Court below also relied heavily upon the letter agreement of August 25, 1944 (Def. Exh. 6), sent by "Dwight D. Eisenhower, *General, United States Army, Commanding General, U. S. Army Forces, European Theater of Operations*" to General Koenig, Chief of the French Military Mission, to which were attached four "unsigned" memoranda concerning arrangements. (At the top of page 5, the Government mistakenly refers to said letter as "the executive agreement of August 25, 1944, whereby the *Provisional Government of the Republic of France* agreed upon request of the *Supreme Allied Commander*, etc."—which is misleading as to the titles of the parties who signed and received said letter.) In signing said letter, General Eisenhower acted in his capacity as Commanding General of the U. S. Forces, and as such was sworn to uphold the Constitution. For said reason, in addition to the other reasons set out in Questions 1 and 4, pp. 2, 15-17, 20-23 of Petition for the Writ, said letter and attached four memoranda must be deemed null and void to the extent that the Constitutional property rights of an American citizen are violated therein.

(c) The instructions issued by the French General Bookkeeping Department, referred to by the Commissioner as "Aid to Allied Forces, General Instruction No. 1" (Def. Exh. 4, 5) cannot affect adversely the Constitutional relationship existing between the United States and an American citizen.

(d) Nor can Forms No. 101 and 102, the "Demand" and "Receipt", issued by the French, affect adversely said Constitutional relationship.

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(e) Furthermore, said "Demand", dated February 27, 1945, was served upon the French Mayor only four months after occupation of petitioner's property by the U. S. Forces (Pltf's Ex. 11). That a prior demand was made is conjecture or hearsay. Mrs. Kelly will prove that the French Mayor was in her employ as her caretaker in charge of her property, and furnished her with the Demand (Pltf's Ex. 11) served upon him.

The Government's statement at page 2 that "in 1944 the property again was taken by French authorities under the laws of France and turned over to the American Army" is mistaken and contrary to the evidence (Pltf's Exh. 13). The Government's statement at pp. 5-6 that "*before* occupying petitioner's premises on October 17, 1944, the Army formally requested, by means of a Form No. 101, that French Authorities make petitioner's chateau available for Allied use" is also mistaken and contrary to the evidence (Pltf's Exh. 11).

(f) The Court below erred in finding "There is no evidence of any authority under which United States Forces might have acted in occupying the premises other than SOP No. 10F, etc." It is well established that the plenary war powers vested in Congress under the Federal Constitution and the principal war powers of the President arising from his position as Commander in Chief of the Army and Navy vested in him by the Constitution and delegation of authority by him to the various departments, amply authorize the requisition of property of an American citizen by the U. S. Forces in war-time. *Mitchell* v. *Harmony, N. Y.*, 13 How. 115, 14 L. Ed. 75. Furthermore, the report of the Government herein (Pltf's Exh. 13) expressly admitted:

> "* * * we have ascertained the following: The property of Mrs. Kelly was requisitioned by the

> U. S. Army from 17 October 1944 until 22 August 1945. Prior to the requisition of the property, a survey was made by competent authorities consisting of French and U. S. Government representatives."

Since this is the Government's own admission, it is not objected to as are other hearsay statements contained in said report.

As to Question #2. Petitioner's claim is *not* barred by the six-year Statute of Limitations, for the acknowledgment of the debt (i.e. the executory accord) by the French, who acted as the duly appointed agent or representative of the United States, and the part payments made thereunder by the French, imputed to the United States as principal, tolled the Statute of Limitations. The administrative procedure of settling the petitioner's claim was completed on entering into the accord in 1951. The Court is referred to the cases cited by petitioner in support of the law of agency and tolling of the statute, in her Petition for the Writ, footnote at page 8. The cases cited by the Government are not in point.

The theory of accord and satisfaction is stated in Restatement of Contracts, Ch. 13, par. 417, page 785, pars. a) to d), from which it will be seen that plaintiff could not enforce the accord until breached, and in fact would have been subject to a counterclaim for damages had she done so. The last partial payment was made on June 21, 1951. The plaintiff could not, on August 25, 1951, have anticipated a breach, when the Government alleges that the statute expired. The statute perforce was tolled as of June 21, 1951. The Court is referred to Petition for the Writ, paragraphs 14-17, pp. 7-8.

It is respectfully submitted that, after the expiration of the Statute of Limitations, the Government may not

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repudiate with impunity representations and directions made in writing and orally by the duly constituted authorities to the petitioner, upon which she relied and acted in good faith—to her detriment and irreparable damage. Petitioner has set forth the law involved (page 23, par. 5, and footnote), viz.: that the Government may not even innocently mislead a citizen and then claim the benefit of its deception. The cases cited by the Government are not applicable.

---

It will be noted that the Government has remained aloof and was not impelled to make any comment on petitioner's "Reasons for Granting the Writ," except to state at page 6, in response to petitioner's challenge of the Army's authority to ask the French to furnish American property to the U. S. Forces as reverse lend-lease, without payment of fair compensation, that "if SOP No. 10F were invalid, the Army then acted without authority in requesting the French officials to requisition the chateau" and "in such circumstances petitioner's only claim would be one sounding in tort." This argument is spurious, for as we have shown, in paragraph (f) *supra*, in war-time the U. S. Army has the right to requisition private property needed for war purposes. It is stated in 93 C. J. S., p. 48, Sec. 22f, that "any order or directive which requires the owner to turn over his property, under compulsion or duress, constitutes a taking or requisition."

It has been distressing to behold the attempts of the Government to deprive Mrs. Kelly of the balance of fair compensation due her for the damage to her chateau caused by the 80,000 American servicemen who occupied it for a weekly period, used as a U. S. Replacement Center. In all equity she is entitled to fair compensation.

It was well said by Mr. Jefferson:

> "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

**It is respectfully requested that the petition for a writ of certiorari be granted.**

Respectfully submitted,

GUSTAVE I. JAHR,
*Attorney for Petitioner.*